

1 UNITED STATES COURT OF APPEALS
2 FOR THE SECOND CIRCUIT

3 **SUMMARY ORDER**

4 **THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER**
5 **AND MAY NOT BE CITED AS PRECEDENTIAL AUTHORITY TO THIS OR ANY OTHER**
6 **COURT, BUT MAY BE CALLED TO THE ATTENTION OF THIS OR ANY OTHER**
7 **COURT IN A SUBSEQUENT STAGE OF THIS CASE, IN A RELATED CASE, OR IN**
8 **ANY CASE FOR PURPOSES OF COLLATERAL ESTOPPEL OR RES JUDICATA.**

9 At a stated term of the United States Court of Appeals for the
10 Second Circuit, held at the Thurgood Marshall United States
11 Courthouse, Foley Square, in the City of New York, on the 24th day
12 of September, two thousand and four.

13 PRESENT:

14 HON. ROBERT D. SACK,
15 HON. REENA RAGGI,
16 HON. PETER W. HALL,

17 Circuit Judges.
18

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20 COMPANIA EMBOTELLADORA DEL PACIFICO, S.A.,

21 Plaintiff-Counter-Defendant-Appellant,

22 - v -

No. 03-7979

23 PEPSI COLA COMPANY,

24 Defendant-Counter-Claimant-Appellee.
25 -----

26 Appearing for Appellant: ROBERT Y. LEWIS, Freeman Lewis LLP
27 (Jennifer Freeman, Alexander T.
28 Linzer, of counsel), New York, NY.

29 Appearing for Appellee: LOUIS M. SOLOMON, Proskauer Rose
30 LLP (Michael S. Lazaroff, of
31 counsel), New York, NY.

32 Appeal from the United States District Court for the
33 Southern District of New York (Richard Owen, Judge).

1 UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED
2 AND DECREED that the judgment of the district court be, and it
3 hereby is, VACATED AND REMANDED.

4 The appellant, Compania Embotelladora del Pacifico,
5 S.A. ("CEPSA"), a Peruvian corporation in bankruptcy liquidation,
6 appeals from orders of the district court dismissing its breach
7 of contract action against the Pepsi Cola Company nunc pro tunc
8 to the day of its filing, and denying CEPSA's motion to join a
9 co-plaintiff. Compania Embotelladora del Pacifico, S.A. v. Pepsi
10 Cola Co., 249 F. Supp. 2d 339 (S.D.N.Y. 2003) (hereinafter
11 "Pepsi").

12 The long and complicated history of this case is
13 summarized in the district court's opinion. We will not rehearse
14 it here. We note, however, that: First, this case began as a
15 breach of contract action filed by the liquidator of CEPSA, a
16 soda bottling company, following the acrimonious unraveling of
17 its four-decades-long business relationship with Pepsi. Second,
18 the liquidator -- who had been duly appointed under Peruvian law
19 by CEPSA's creditors to manage the liquidation -- did not inform
20 the creditors of the lawsuit until well after it was filed,
21 although he did ask them to ratify its continuation at the time
22 he disclosed its existence. Third, the committee of CEPSA's
23 creditors empowered under Peruvian law to oversee the bankruptcy
24 (the "Junta") has never formally ratified the bringing of the
25 lawsuit. A subcommittee of creditors repudiated the suit in July
26 2001, while a second subcommittee of creditors renounced the
27 earlier repudiation and ratified the prosecution of the
28 litigation in May 2002.

29 In this appeal, CEPSA asks us to confront, among other
30 things, three issues of Peruvian law: (1) whether a bankruptcy
31 liquidator has the inherent authority to file a lawsuit seeking
32 damages on behalf of the estate, without obtaining the creditors'
33 prior approval, through a "junta" or otherwise; (2) whether the
34 continuation of the litigation has effectively been ratified by
35 the creditors following its repudiation by the first
36 subcommittee; and (3) (a) whether CEPSA's partial assignment of
37 its claims to Financiera de Desarrollo Industrial y Comercial,
38 S.A. ("Fideicosa") is effective, (b) if so, whether Fideicosa
39 should be joined as a plaintiff in this suit, and (c) if it
40 should, what the effect of such joinder has on the pursuit of
41 this lawsuit.

42 As for the first question, the district court
43 determined that the liquidator did not have the inherent
44 authority to bring this lawsuit based on two provisions of

1 Peruvian law: Article 416 of the General Companies Law, and
2 Article 77 of the Capital Restructuring Law. Attempting to
3 harmonize the two laws, the court determined that the word
4 "procedural" in Article 416 limits the "representational power"
5 Article 77 grants the liquidator in legal proceedings, such that
6 the liquidator is effectively without substantive authority to
7 file civil lawsuits absent the creditors' advance permission.
8 Pepsi, 249 F. Supp. 2d at 340.

9 Reviewing the district court's determination of foreign
10 law de novo, Curley v. AMR Corp., 153 F.3d 5, 11 (2d Cir. 1998),
11 we disagree with that reading of the language of Article 77. The
12 law grants the liquidator "full agency" to "safeguard the
13 interests of the bankruptcy estate or the insolvent party, in
14 court or out of it." Capital Restructuring Law, Article 77(1).
15 Article 77 also incorporates Law No. 26,539, which grants
16 corporate managers "authority of representation in legal
17 proceeding," and points, in turn, to Article 75 of the Code of
18 Civil Procedure, which refers to the power "to file suits."

19 CEPSA's liquidator was also contractually authorized to
20 file the lawsuit. Clause Nine of the Liquidation Agreement
21 between the liquidator and the Junta permits the liquidator "[t]o
22 represent CEPSA in all legal acts performed on its behalf,
23 whether judicial or non-judicial, merely administrative acts, or
24 those that require a special power of attorney . . . without any
25 limitation or restriction save those that are established in this
26 Agreement."

27 This interpretation of the liquidator's authority is
28 consistent with a decision of Peru's National Institute for the
29 Defense of Competition and Protection of Intellectual Property
30 ("INDECOPI"), a government agency with jurisdiction over various
31 economic matters, including bankruptcy. In the May 29, 2002
32 decision, that agency's highest Tribunal noted that the Junta was
33 "free" to "decid[e] on the confirmation of the lawsuit . . . if
34 it deems convenient." The Tribunal at no time so far as we are
35 aware suggested that the liquidator lacked authority to file the
36 lawsuit in the first instance; its statements seem to assume that
37 the liquidator had such authority. We therefore conclude that
38 the liquidator had the authority to file the lawsuit against
39 Pepsi absent a contrary instruction from the creditors.

40 As for the second issue of Peruvian law raised before
41 us, we note that the liquidator's actions were challenged, not
42 by the Junta, but by the Special Creditors Committee delegated by
43 the Junta to oversee the company's day-to-day affairs. That
44 subcommittee voted on July 11, 2001 to express its "disagreement

1 with the continuation" of the lawsuit against Pepsi. The
2 district court found that this resolution was binding, and that
3 it, in effect, "was the end of it." Pepsi, 249 F. Supp. 2d at
4 342. CEPESA argues that the subcommittee's July 11 vote was
5 advisory only, and that in any case it was nullified by a second
6 subcommittee elected to replace the first in May 2002. In
7 addition, CEPESA contends that the Junta impliedly ratified the
8 lawsuit -- thereby overruling the first subcommittee -- by voting
9 in early 2002 to appoint a new liquidator who promised to pursue
10 the lawsuit.

11 We think it unwise to decide this question on the basis
12 of the information before us. It seems to us that the ultimate
13 question is whether the creditors of CEPESA, in whose interest the
14 liquidation proceedings are being conducted and this action was
15 brought, have validly authorized the continuation of this
16 litigation. We have "repeatedly noted the importance of
17 extending comity to foreign bankruptcy proceedings." Finanz AG
18 Zurich v. Banco Economico S.A., 192 F.3d 240, 246 (2d Cir. 1999).
19 The INDECOPI Tribunal held on May 29, 2002, that the Junta was
20 "free to meet again with the purpose of deciding on the
21 confirmation of the lawsuit." We conclude that to assure
22 ourselves that this lawsuit is being maintained by CEPESA with the
23 approval of CEPESA's creditors, the Junta itself -- not the
24 Special Creditors Committee -- must, within a short but
25 reasonable period of time to be established by the district
26 court, formally give its approval in order for it to continue
27 this lawsuit. If the Junta does not do so within the time
28 allotted, the district court may again dismiss this lawsuit as to
29 CEPESA.

30 The final complication relates to the effectiveness of
31 CEPESA's partial assignment of its claims to Fideicosa. Although
32 the district court denied as moot the motion to add Fideicosa as
33 a co-plaintiff, the court never reached the issue of the validity
34 of the assignment, which is now being litigated before the courts
35 of Peru. In light of our remand, the motion to add Fideicosa is
36 no longer moot; nevertheless, the district court may defer ruling
37 on this motion until the Peruvian courts resolve the validity of
38 CEPESA's partial assignment.

39 We therefore hereby VACATE the judgment of the district
40 court and REMAND this matter with instructions for the court to
41 stay the proceedings for a short, reasonable period of time to
42 permit the Junta to vote on the continuation of the lawsuit. If
43 the Junta ratifies the continuation of the lawsuit within the
44 allotted time, CEPESA may, of course, pursue it. Otherwise, CEPESA
45 shall be dismissed as a plaintiff.

The court shall also reconsider its dismissal of the motion to join Fideicosa as a co-plaintiff, bearing in mind that the validity of CEPSA's partial assignment of its claims is the subject of pending legal proceedings in Peru. We owe those proceedings deference and the court, therefore, may defer its ruling on the motion until the Peruvian courts determine the validity of the assignment.

Jurisdiction will be restored to this Court without a new notice of appeal when any of the parties furnishes a copy of the district court's ruling on remand to the clerk of this Court. The case shall be referred to this panel upon its return to this Court's jurisdiction. At that time, the Court will determine whether and to what extent further briefing will be needed. After any further order by this Court, the parties will be afforded a renewed opportunity to seek rehearing and rehearing in banc.

FOR THE COURT:
ROSEANN B. MACKECHNIE, Clerk

By: Richard Alcantara, Deputy Clerk 9/24/04